In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1240

GEORGE CURTIS BIRD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A1-A2) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A2-A3) was entered on February 29, 1972. The petition for a writ of certiorari was filed on March 29, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether in the circumstances of this case a border search and seizure by an immigration and customs officer violated the Fourth Amendment.

2. Whether petitioner's conviction is supported by sufficient evidence.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of having facilitated the transportation of 168 pounds of illegally imported marihuana, in violation of 21 U.S.C. (1964 ed.) 176a, and was sentenced to six years' imprisonment and fined $2,500. The court of appeals affirmed *per curiam* (Pet. App. A1–A2).

The evidence showed that on January 29, 1971, at approximately 11:00 p.m. a pickup truck carrying a sleeping compartment ("camper") was stopped at a Border Patrol checkpoint some eight miles north of Laredo, Texas, on Interstate Highway 35. Melvin D. Anderson [1] owned and was driving the truck, which had New Mexico license plates, and petitioner was a passenger (Tr. 8, 46–49). Border Patrolman William Randolph, Jr.—who was authorized both as an immigration officer and as a customs agent (Tr. 29–30, 33)—asked their citizenship and, because of the camper, requested that they stop at the side of the road for a secondary inspection (Tr. 8, 47).

While petitioner remained in the truck, Anderson went to the back of the camper and, at the agent's request, opened three compartments which ran on

[1] Before the trial herein, Anderson was killed in an automobile accident.

both sides and across the width of the truck (Tr. 10, 20, 48–49). The compartments on the sides were approximately five feet in length, about seventeen inches in width and about fourteen inches in height (Tr. 10). They were opened with no difficulty and contained tools and other miscellaneous objects (Tr. 10, 20). The compartment next to the cab of the truck was larger, with dimensions of 6 feet in length, 20 inches in height and 3 feet in width (Tr. 10), and it would not open. Anderson asked petitioner through the back window of the truck for a screwdriver. With this he pried the lid up two or three inches and let it close; he opened it again a little wider, and asked if the agent had seen enough. The agent replied no, and the lid was opened wider. In the process the agent detected an odor that was "different than it was normally in the truck" and shined his flashlight into the compartment. He observed two large burlap sacks with Spanish writing on them which are commonly used to keep coffee beans (Tr. 12, 49–50, 54). When Anderson closed the compartment, the agent stated that he would like to know what was in the bags. Anderson replied "You know." When the agent asked if it was marihuana, Anderson nodded his head affirmatively (Tr. 12, 49–50). At this point, both petitioner and Anderson were arrested and advised of their rights (Tr. 15, 52). Two other large sacks containing marihuana were found in the compartment, one with Spanish writing on it and the other with the English word "Beans" (Tr. 54).

Melvin M. Cox, a special agent with the Bureau of Customs, later questioned petitioner at the Border

Patrol Station after advising him of his rights. Cox testified that petitioner initially indicated that he would not cooperate. Petitioner then related that a Negro male approached him in the La Honda Motel in Albuquerque, New Mexico, and hired him to deliver marihuana from Laredo, Texas, to Albuquerque for a sum of money. Anderson accompanied petitioner to Laredo, where they stayed at the El Rey Motel and left the truck outside with the keys in the ignition. On the evening of January 29, 1971, an unknown person took the truck for approximately an hour. When it was returned, petitioner and Anderson found the marihuana in the truck and completed plans to return to Albuquerque (Tr. 64–68).

At the close of the government's case petitioner made a motion for acquittal, which the trial judge denied. The defense then rested (Tr. 78–79).

ARGUMENT

1. Petitioner contends that the search of the Anderson truck and the seizure of evidence were unlawful under the Fourth Amendment, apparently on the ground that there was no probable cause (Pet. 7–11). However, this was a border search conducted by immigration and customs officers. As the court below concluded, the search and seizure here fully comport with established principles applicable to such searches.

Immigration officers have the power to conduct a warrantless search of vehicles for aliens within 100 air miles of any external boundary. 8 U.S.C. 1357(a)(3); 8 C.F.R. 287.1(a)(2). Probable cause is not required for such a search. *E.g., Duprez* v. *United*

States, 435 F. 2d 1276, 1277 (C.A. 9). The principal limitation upon the power of border patrol agents to check for aliens without a warrant is that they may not search places in which no person could hide. See *Valenzuela-Garcia* v. *United States,* 425 F. 2d 1170, 1172 (C.A. 9). Furthermore, under the customs laws (19 U.S.C. 482), border officials are authorized to establish checkpoints within a reasonable distance from a border crossing and, without a warrant, to conduct searches for contraband if there is a reasonable suspicion that a person is carrying unlawfully imported merchandise. See *Morales* v. *United States,* 378 F. 2d 187 (C.A. 5). As in this case, border officials at established checkpoints generally are authorized as both immigration officers and customs agents.

The search and seizure in the present case were proper. The initial search of the vehicle was valid under the immigration laws. The truck was stopped at 11:00 p.m. at an established checkpoint only eight miles from (and going north, away from) the border. Patrolman Randolph was told that petitioner and Anderson had visited Laredo, Texas, on the border. He testified that at this checkpoint he had found smuggled aliens every day and that in many cases he had found them concealed in campers, such as the one attached to the truck in which petitioner was riding. Thus, the agent properly checked to see if aliens were hidden in the camper, or in the compartments on the inside which were large enough to conceal a person. Compare *United States* v. *Saldana,* 453 F. 2d 352 (C.A. 10). Although the agent found no aliens, he noticed a different odor and saw the sacks with Span-

ish writing, from which he reasonably suspected that contraband might be involved. He was, therefore, justified in conducting a further search in his capacity as a customs agent. He did not do so, however, but instead only asked what was in the sacks. When Anderson admitted that the sacks contained marihuana, the agent had clear authority under the customs law to reopen the compartment and seize the sacks. On these facts, there was no violation of the Fourth Amendment. See *United States* v. *Maggard,* 451 F. 2d 503 (C.A. 5), certiorari denied April 3, 1972, No. 71–6006; *Fumagalli* v. *United States,* 429 F. 2d 1011 (C.A. 9).[2]

There is no merit to petitioner's contention that the decision below conflicts with other court of appeals decisions. On the contrary, the decision here follows the approach taken by other courts of appeals. The legality of a border search turns on the particular facts presented, and the location of the checkpoint and the purpose and the extent of the search are the determinative factors. While, as petitioner notes, there are differences in outcome in various cases, that

[2] The fact that the immigration and customs statutes permit search of a vehicle on less than probable cause at locations not actually at the border does not contravene the Fourth Amendment. It is generally accepted that these statutes represent a lawful exercise of Congress' power to protect the boundaries of this country against illegal entry of aliens and unlawful imports. *See United States* v. *Miranda,* 426 F. 2d 283, 284 (C.A. 9); *Morales* v. *United States,* 378 F. 2d 187, 189 (C.A. 5); see also *United States* v. *Almeida-Sanchez,* 452 F. 2d 459 (C.A. 9), petition for a writ of certiorari pending, No. 71–6278.

is the result of differing facts rather than differences in the legal principles applied.[3]

2. Petitioner also suggests (Pet. 12) that there was insufficient evidence showing importation and knowledge. By his own admission, however, petitioner agreed to bring marihuana from Laredo, Texas—on the border—to New Mexico. He also knew that some of the marihuana was Acapulco Gold, a special strain. He and Anderson waited until dark to leave Laredo. The court of appeals correctly held that "[t]his evidence was sufficient to create an issue for the jury as to whether the marihuana was illegally imported and the [petitioner] had knowledge thereof" (Pet. App. A1–A2).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[3] For example, the decision in *Roa-Rodriquez* v. *United States*, 410 F. 2d 1206 (C.A. 10)—to which petitioner refers (Pet. 11)—is consistent with the decision below. In that case, a car was stopped at a random checkpoint and its trunk was searched for aliens. Although the trunk contained no aliens, it did contain a jacket which was searched and found to contain narcotics. The court held that the search of the trunk was lawful, but that the jacket could not be searched either under the immigration or the customs laws since the search for aliens had ended and there was no reasonable suspicion to support a search for contraband.

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